BERENERGY CORP.

IBLA 85-595 Decided November 17, 1986

Appeal from a decision of the Montana State Office, Bureau of Land Management, assessing liquidated damages for failure to file monthly reports in a timely manner with respect to Indian oil and gas leases.

Vacated and remanded.

1. Oil and Gas Leases: Civil Assessments and Penalties

An automatic assessment for failure to file monthly reports of operations in a timely manner pursuant to 43 CFR 3163.3(h) may be vacated by the Board on appeal in view of the suspension of that regulation and the change in Departmental policy that such assessments should automatically be levied.

APPEARANCES: J. Roy White, Operations Manager, Berenergy Corporation, Denver, Colorado.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Berenergy Corporation (Berenergy) has appealed from a decision of the Montana State Office, Bureau of Land Management (BLM), dated April 9, 1985, which sustained an assessment of $600 for failure to timely file monthly reports for the month of January 1985 with respect to certain Indian oil and gas leases 1/ as required by 43 CFR 3162.4-3. The $600 total assessment represents an automatic assessment of $100 for each of the six leases involved, pursuant to 43 CFR 3163.3(h).

By letter dated March 18, 1985, BLM notified appellant of its failure to file in a timely manner the required monthly report of operations, Form 3160-6 (formerly 9-329A), for the month of January 1985 concerning the six Indian leases. BLM stated that "failure to file reports and maintain records is a violation of 43 CFR 3162.4-3, and is subject to an automatic assessment of $100 per report under 43 CFR 3163.3(h)." Accordingly, BLM imposed a total

1/ The numbers of the oil and gas leases are identified as follows: 14-20-251-4960, 14-20-251-4962, 14-20-251-6156, 14-20-251-6158, 14-20-251-6174, and 14-20-251-6175.

assessment of $600. This letter advised appellant of its right to request a technical and procedural review of the assessment.

By letter dated March 29, 1985, appellant requested a technical and procedural review, stating its reasons for contesting the $600 assessment. On april 9, 1985, BLM issued its decision addressing appellant's request for technical and procedural review and noting initially that monthly reports for January 1985 respecting the six Indian leases were received in the Great Falls office 8 days after the required filing date. BLM explained that the technical and procedural review process requires only a consideration of whether the authorized officer is "technically and procedurally correct in identification of the violation and assessment." BLM determined the authorized officer was correct in identifying the violation of 43 CFR 3162.4-3, and in imposing an assessment of $100 per violation under 43 CFR 3163.3(h).

The regulation which sets forth the requirement that an oil and gas lessee file a monthly report of operations, 43 CFR 3162.4-3, provides in pertinent part as follows:

> A separate report of operations for each lease shall be made on Form 9-329 for each calendar month, beginning with the month in which drilling operations are initiated, and shall be filed in duplicate with the authorized officer on or before the 10th day of the second month following the production month, unless an extension of time for the filing of such report is granted by the authorized officer.

As required by that regulation, appellant must have filed a monthly report regarding each of its leases on or before the 10th day of the second month following the production month; thus, monthly reports for January 1985 were due in the appropriate BLM office no later than March 11, 1985 (since March 10 fell on a Sunday). Appellant's monthly reports regarding the six Indian leases involved herein were not received by the Great Falls Resource Area Office, the appropriate BLM office, until March 18, 1985.

In the statement of reasons for appeal, Berenergy reiterates its arguments advanced in support of its request for technical and procedural review. Appellant states the disputed forms were actually mailed to BLM on March 6, 1985, in time to reach their destination by the required date, but the delay in their delivery to BLM was due to a problem with the postal service:

> Attached are copies of Form 3160-6 for the month of January, 1985, for each of the above leases which are quoted in the Bureau of Land Management letter of March 18, 1985. Although not noted on this form, Berenergy's production clerk indicates that these forms were mailed from this office on March 6, 1985. It was Berenergy's productions clerk's feeling that mailing of the reports on this date would allow sufficient time for the forms to reach the Great Falls Resource Area Office of the BLM no later than Monday, March 11, 1985. Since March 10 occurred on a

> Sunday, it was believed that receipt of the reports on the following Monday, March 11, 1985, would suffice. Apparently the reports were not received by the Great Falls Resource Area Office until March 18, 1985. Unfortunately, the envelope in which the reports were received was not retained and the postmark by the post office as to the time received in Denver, Colorado could not be confirmed. A review of Berenergy's record in filing these reports, however, will confirm our timeliness in submitting the reports as required.
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> Based upon the verification by Berenergy's production clerk that these reports were mailed on March 6, 1985, in sufficient time to arrive by the required date and Berenergy[']s record in filing these reports in a timely manner in the past, it is requested that Berenergy not be assessed the $100 penalty per report for late submittal. Berenergy has absolutely no control over the handling of mail by the United States Postal Service once it has been deposited in Denver, Colorado. It is believed that submittal of the reports in what is normally an adequate period of time for receipt in a timely manner should suffice as compliance by the operator. It is not believed that Berenergy or other operators should be held responsible and fined for events over which we have absolutely no control.

(Request for Technical and Procedural Review, at 1-2).

Appellant's argument for reversal of the BLM decision is that it mailed the monthly reports in sufficient time for them to reach the appropriate BLM office by the deadline, but that it "has absolutely no control over the handling of mail" by the Postal Service, which, it asserts, was responsible for the tardy filing. This does not negate the existence of a violation of the regulation at 43 CFR 3162.4-3.

Departmental regulations define "file" to mean "being received and date stamped by the proper BLM office." 43 CFR 1821.2-2(f). Moreover, 43 CFR 3162.4-3, the regulation which sets forth the requirement that oil and gas lessees file monthly reports, provides clearly that such reports must be "filed in duplicate with the authorized officer on or before the 10th day of the second month following the production month * * *." The asserted delay on the part of the Postal Service does not excuse appellant's failure to comply with the cited regulation. See Delbert A. Reese, 75 IBLA 74 (1983).

[1] BLM imposed the $600 assessment against appellant pursuant to 43 CFR 3163.3, which provides in pertinent part:

> Certain instances of noncompliance result in loss or damage to the lessor, the amount of which is difficult or impracticable to ascertain. Except where actual losses or damages can be ascertained in an amount larger than that set forth below, the following amounts shall be deemed to cover loss or damage to the lessor from specific instances of noncompliance.

* * * * * * *

(h) For failure to maintain records and file required reports, records, or data as required by the regulations in this part and by applicable orders and notices, $ 100.

Notwithstanding appellant's failure to file the reports timely, we note the assessment regulation at 43 CFR 3163.3(h) was suspended by notice printed in the Federal Register (50 FR 11517 (Mar. 22, 1985)). This suspension was implemented by BLM Instruction Memorandum No. 85-384 (Apr. 16, 1985), which provided in relevant part:

> Enclosed is a copy of the Notice of Intent to propose rulemaking which was published in the Federal Register on March 22, 1985. As stated in this notice, the following actions are hereby taken:
>
> > The assessment for noncompliance provisions under 43 CFR 3163.3(c) through (j) are suspended, except where actual loss or damage can be ascertained.

BLM's proposed rulemaking, published on January 30, 1986, at 51 FR 3882, would eliminate automatic assessments for failure to file reports in a timely manner under 43 CFR 3163.3(h). In Yates Petroleum Corp., 91 IBLA 252 (1986), we considered the effect of the proposed rule on assessments for noncompliance under 43 CFR 3163.3(h) and stated:

> The proposed rules would eliminate the assessment for failure to * * * file reports in a timely manner under 43 CFR 3163.3(h). In the preamble to the proposed regulations BLM states: "Assessment under the various Acts authorizing the leasing of minerals would be modified by the proposed rulemaking to eliminate automatic assessments for noncompliance involving violations of §§ 3163.3(d), (e), (g), (h), and (j) of the existing regulations. (Emphasis added.) 51 FR 3887 (Jan. 30, 1986). [2/] Therefore, under the proposed rules BLM would not automatically assess Yates but would be required to give Yates notice that it had * * * violated the reporting requirements.
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> We recognize that * * * 43 CFR 3163.3(h) * * * [was] in effect at the time BLM took its action, and neither the suspension nor the proposed regulations are clearly dispositive herein. They do, however, reflect the Department's present policy concerning the levy of an assessment for failure to comply with the identification and the reporting requirements. In the past this Board has applied the present BLM policy to a pending matter, if

2/ The Board has observed that the imposition of automatic assessments was a policy determination and not a statutory or regulatory requirement. Lyco Energy Corp., 92 IBLA 81, 85 (1986).

> to do so would benefit the affected party, and if there were no countervailing laws, public policy reasons, or intervening rights. Somont Oil Co., Inc., 91 IBLA 137 (1986). For that reason, we vacate the decision to levy assessments pursuant to * * * 43 CFR 3163.3(h). [Footnote omitted.]

91 IBLA at 263-64. Accord, Ward Petroleum Corp., 93 IBLA 267 (1986). We find the ruling in Yates Petroleum Corp., supra, to be controlling in this case. Accordingly, the decision appealed from is vacated and the case is remanded.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated and the case is remanded.

C. Randall Grant, Jr.
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Will A. Irwin
Administrative Judge